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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-5208

EDWARD MARTIN McKENNA,
Petitioner,

vs.

NORTH CAROLINA,
Respondent.

* *

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

* *

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The Petitioner, Edward Martin McKenna, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Carolina, filed in this case of Edward Martin McKenna v. State of North Carolina, No. 22 - Wake, May 14, 1976.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 N.C. 668, and 224 S.E.2d 537 (1976). A copy of this opinion is appended to this Petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was filed in this cause on May 14, 1976, and issued on _____, 1976. The jurisdiction of this Court is involved under 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

1. Did the Trial Court err in permitting the State to introduce evidence which was seized by an agent of the State Bureau of Investigation without a warrant and later seized by other federal and state agents acting pursuant to a valid warrant?

2. Did the Trial Court err in denying the Petitioner's motion to dismiss the charge where the Petitioner was never properly charged with the crime thereby denying him due process of law?

3. Should the Petitioner's death penalty be now automatically reduced to life imprisonment?

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const. amend. IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but on probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. U.S. Const. amend. XIV, 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. U.S. Const. amend. VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

4. U.S. Const. amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The Defendant appellant was charged in a Bill of Indictment with the murder of William Blaney Holland, Jr., on November

10, 1973 (R p 10). The case came on for trial before the Honorable Giles R. Clark, Judge Presiding, and a jury at the first July, 1975 Criminal Court Session of Wake County Superior Court. Prior to the arraignment and plea of the defendant, motions were made by the defendant to dismiss the charges against him and to suppress evidence to be presented by the State (R pp 14 and 16). The Motion to Dismiss was denied after a voir dire hearing (R p 38) and during the trial a voir dire hearing was held on the Motion to Suppress, said motion being denied. (R pp 82 and 104).

Evidence for the State tended to show that William Blaney Holland, Jr., returned to his home in the early morning hours of November 10, 1973. Two persons had broken into the home and were in the process of burglarizing same. Mr. Holland confronted the two burglars and a gunfight ensued. During the gunfight, Mr. Holland was shot in the head and died as a result of the gunshot wound.

After an investigation of the crime scene, it was discovered that a Colt .38 revolver belonging to Mr. Holland was missing. In march, 1974, Agent Wesley Terry was investigating the defendant appellant for other crimes unrelated to this appeal. During his investigation and pursuant to an illegal search and seizure, Agent Terry obtained from the McKenna residence the Colt .38 revolver which was missing from the Holland burglary. The defendant appellant was arrested on federal and state charges and after the aforementioned revolver was traced, he was indicted as described above. (R p 10). The state offered evidence of the co-defendant Charles Pittman, supposedly the other man in the house the night of the murder, who implicated the defendant appellant as being the perpetrator of the crime. (R pp 64-66).

The Defendant appellant's evidence tended to show that he did not commit the crime charged but at the time of the murder, he was at a dance in Chadbourn, North Carolina.

A verdict of guilty of murder in the first degree was returned by the jury on July 11, 1975. The defendant appellant was sentenced to death.

Petitioner entered appropriate exceptions and appealed to the Supreme Court of North Carolina, assigning as error the denial of his motion to suppress (R.pp. 82 and 104), and the denial of his motion to dismiss (R. p. 38).

By opinion dated May 14, 1976, the North Carolina Supreme Court found no error and affirmed Petitioner's conviction. (Appendix)

REASONS FOR GRANTING THE WRIT

1. THE SEARCH QUESTION. REVIEW OF THE QUESTION OF THE LEGALITY OF THE SEARCH IS IMPORTANT BECAUSE THE PRESENT FACT SITUATION PRESENTS AN AREA OF ABUSE OF THE RIGHT TO BE FREE OF UNREASONABLE SEARCHES.

Defendant appellant argues that the photographs added little, if any, in the way of probative value and tended solely to inflame the jury and thus should have been excluded by the trial court.

On March 26, 1975, Wesley Terry, a special agent with the State Bureau of Investigation, entered the petitioner's home while the defendant was not present, without his consent, went to the defendant's bedroom and searched in the top dresser drawer next to the bed, there finding a .38 caliber pistol. He recorded the serial number of the pistol (R p 72). Agent Terry remained in the house until other state and federal agents arrived with search warrants and with the defendant who had at that time been placed under arrest (R p 74).

Except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. Camera v. Municipal Court of San Francisco, 387 US 523 (1967). The existence of such an exceptional situation to authorize officers to

search a dwelling without a warrant is not disclosed where (1) there is no suggestion that anyone consented to the search; (2) the officers were neither responding an emergency nor in hot pursuit of a fleeing felon; (3) the goods ultimately seized were neither in the process of destruction or about to be removed from the jurisdiction; and (4) the officers were able to procure warrants for the accused's arrest. Vale v. Louisiana, 399 US 30 (1969).

The circumstances of the search by Agent Terry of defendant McKenna's home were not such as to justify a search without a warrant and the search was therefore, unreasonable under the Fourth and Fourteenth Amendments. Evidence that is obtained by an illegal search or seizure. Weeks v. United States, 232 US 383 (1914).

The purpose of the Fourth Amendment is to guarantee that every person shall be free from unreasonable searches and seizures. The exclusionary rule is calculated to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it. Elkins v. United States, 364 US 206 (1960).

Unlike tangible evidence such as drugs or stolen property, intangible evidence such as serial numbers on firearms can be seized more than once while the firearm itself remains in the same location. Petitioner McKenna contends that unless courts exclude evidence seized in a subsequent legal search which has previously been seized in an illegal search, the purpose of the Fourth Amendment and the exclusionary rule will be contravened.

2. THE QUESTION OF THE CHARGE. REVIEW OF THIS QUESTION IS IMPERATIVE TO DETERMINE THE SUFFICIENCY OF THE STATE'S PRACTICE OF INFORMING THE PETITIONER OF THE CHARGES AGAINST HIM.

Petitioner was first taken into custody by Federal officers on or about the 26th day of March, 1975 (R p 15). He remained in custody of either federal or state officials from that time until the time of his trial for murder in state court. A complaint for arrest and a warrant for first-degree murder was filed against defendant, sworn to and issued on the 20th day of April, 1975 (R pp 9, 10), but such warrant was never served on defendant (R p 30). A true bill was returned on an indictment charging defendant with murder and a capias was issued on the 28th day of April, 1975 (R pp 10, 11). Defendant was never served with a copy of the indictment. Defendant was finally served with the capias instanter on the 15th of May, 1975. The capias stated that Defendant had been indicted by the grand jury for murder and no more (R p 27). Counsel for defendant was permitted to withdraw on the 30th of May, 1975 and not until that time did defendant acquire effective representation in this matter with the appointment of the present counsel (R p 1). The trial of defendant began on the 7th of July, 1975. Thus, even though defendant was continuously in custody, he was not furnished with a warrant or other proper criminal process advising him of the particulars of the crime charged until shortly before the trial.

The Sixth Amendment to the Constitution of the United States guarantees that "the accused shall enjoy the right...to be informed of the nature and cause of the accusation." The right guaranteed by the Constitution of the United States would seem to require that the offense be charged with clearness and all necessary certainty. This requirement does not seem to be met by a mere capias reciting only that defendant is charged with murder.

Defendant contends that the capias was insufficient notice of so serious a charge and that the delay in being properly and fully informed greatly prejudiced him in his preparation

and defense against such a charge. Defendant was not properly charged with the crime in that he was not fully adequately informe and thus important constitutional rights were infringed upon.

3. THE PUNISHMENT QUESTION. THIS QUESTION IS IMPORTANT IN THAT THE STATUS OF THOSE PRISONERS NOW FACING DEATH SENTENCES SHOULD NOT BE FINALLY SETTLED.

North Carolina Session Laws 1973, C. 1201, s. 7, effective April 8, 1974, provides "In the event it is determined .... that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment." For a crime committed before this time, however, there was no similar provision. The North Carolina Supreme Court is now in the position of determining what is to be done with those who had received the death sentence under the law found unconstitutional in Woodson v. North Carolina ___ U.S. ___, decided on July 2, of this year. The Court does not have adequate guidelines within which to make these determinations, as there is no provision for the reduction of the sentences for those whose crimes took place before April 8, 1974.

CONCLUSION

For these reasons, a Writ of Certorari should issue to review the judgment and opinion of the North Carolina Supreme Court.

Respectfully submitted,

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